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IN THE

Supreme Court of the United States

No. 339

JAMES J. MORONEY, *Petitioner*

v.

J. M. McKIBBEN, ET AL, *Respondents*

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI

CARL L. SHIPLEY
SAMUEL RESNICOFF

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PRELIMINARY STATEMENT

James J. Moroney, by his attorneys Carl L. Shipley and Samuel Resnicoff, respectfully requests a rehearing of the order denying his petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above captioned case on May 9, 1957.

STATUTES INVOLVED

5 U.S.C. 863

"* * * such preference eligible shall be allowed a reasonable time for answering the same [the

charges preferred against him] *personally and in writing.*" (Emphasis supplied).

5 U.S.C. 1009

(a) "Any person suffering legal wrong because of any agency action * * * shall be entitled to judicial review thereof."

(e) * * * the reviewing court shall * * * hold unlawful * * * agency action * * * found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * * * (2) without observance of procedure required by law."

STATEMENT OF THE CASE

Petitioner was dismissed on charges on May 22, 1955 from his position as Postmaster, Pleasantville, New York, a position he had held since 1935. Petitioner received no hearing at the agency level. The Second Civil Service Region reversed petitioner's removal on grounds that the charges were not sustained, as follows:

U. S. CIVIL SERVICE COMMISSION
SECOND U. S. CIVIL SERVICE REGION
OFFICE OF THE DIRECTOR, NEW YORK, N. Y.

APPEAL OF JAMES J. MORONEY,
UNDER SECTION 14 OF THE VETERANS' PREFERENCE ACT OF 1944

Introductory Statement

Mr. Moroney appealed to this office on May 3, 1955 from the decision of the Post Office Department to effect his removal from the position of Postmaster, U. S. Post Office, Pleasantville, N. Y., effective thirty days from the receipt of the letter of decision (April 22, 1955) or as soon thereafter

as his successor could be installed, based on charges outlined hereafter.

Investigation was initiated by this office since appellant established his veterans preference and entitlement to appeal. During the investigation pertinent information was obtained from the Department's files and affidavits were secured from the appellant, Post Office officials and personnel and private citizens designated by the appellant. A statement was also obtained from the Assistant Postmaster General, Bureau of Post Office Operations relative to the Department's position in the case. A hearing was held in this office at the appellant's request on July 27, 1955 and a copy of the transcript of hearing is attached as part of this decision.

In reaching a decision in this case, consideration has been given to the record evidence and affidavit testimonies, as well as the hearing testimony, all of which has been made available for review and comment by the parties concerned.

Summary and Analysis of the Evidence

The appellant was advised by letter dated January 14, 1955 from Post Office Inspectors Myers and Bader of his proposed separation or other disciplinary action based upon three charges of violation of the provisions of Article 21, Chapter 1 of the Postal Manual, which requires that Postmasters at offices of the first class shall devote not less than eight hours during the business part of the day to the conduct of their offices and the performance of duties appropriate to their positions. The specifications of these charges were as follows:

(1) On August 25, 1954 he first arrived at the Post Office at 9:23 a.m. and departed at 11:00 a.m.; he returned to the Post Office at 3:36 p.m. and departed for the second time at 4:22 p.m.;

and he returned for the third time at 4:41 p.m. and departed at 5:19 p.m., spending a total of three hours and one minute at the Post Office. On the same day he was observed to spend four hours and sixteen minutes at the plumbing firm of James J. Moroney, Inc., 201 Tompkins Avenue, Pleasantville, N. Y., between the hours of 9:00 a.m. and 6:00 p.m.

(2) On September 2, 1954, he first arrived at the Post Office at 9:20 a.m. and departed at 10:37 a.m.; he returned to the Post Office at 2:10 p.m. and departed for the second time at 2:50 p.m.; he returned for the third time at 3:40 p.m. and departed at 3:47 p.m.; he returned at 5:10 p.m. and departed at 5:25 p.m.; and he returned for the last time at 5:33 p.m. and departed at 5:35 p.m., spending a total of two hours and twenty-one minutes at the Post Office. On the same day he was observed to spend two hours and five minutes at the firm of James J. Moroney, Inc., same address between the hours of 9:00 a.m. and 6:00 p.m.;

(3) On September 22, 1954, he first arrived at the Post Office at 11:03 a.m. and departed at 11:40 a.m.; he returned at 11:50 a.m. and departed for the second time at 12:05 p.m.; and he returned at 1:30 p.m. and departed at 2:45 p.m., spending a total of two hours and seven minutes at the Post Office. On the same day he was observed to spend three hours and fifteen minutes at the firm of James J. Moroney, Inc., same address, between the hours of 9:00 a.m. and 6:00 p.m.

The fourth charge stated that in an affidavit given on January 10, 1955, appellant stated he spent approximately eight hours daily between 9:00 a.m. and 6:00 p.m., Monday through Friday at the Post Office and their (the Inspectors') investigation disclosed this was not true.

The appellant replied on February 14, 1955 setting forth in detail the need for him to spend considerable time outside of the Post Office premises in the conduct of investigation to secure additional Post Office space, and stated that among the places he and Inspector Hartwell visited, was the J. J. Moroney Inc. warehouse which was under consideration for possible use. He stated that as a result of his daily survey in the surrounding area, a building was found that was under the control of the Reader's Digest and, as a result of his numerous visits to that company and their building, a contract was signed by their representative, Mr. Harry G. Wilcox on September 23, 1954. Insofar as the dates set forth in the charges were concerned, the appellant stated he kept no diary of his daily activities. He stated that the regulations do not require him to remain in the office at all times, if his work in the office has been properly taken care of and there are postal matters outside the office requiring his attention; further, as Postmaster, he could not reasonably be expected to remain at his desk or in his office eight full hours per working day and properly discharge his duties as Postmaster in serving the public.

The appellant was advised by letter dated April 22, 1955 from Mr. N. R. Abrams, Assistant Postmaster General, Bureau of Post Office Operations, that after consideration of the evidence submitted, including his reply, it had been decided the charges had been sustained and he would be removed as Postmaster effective thirty days from the receipt of the letter or as soon thereafter as his successor could be installed.

During the Commission's investigation, the following pertinent information and affidavits were obtained:

Copy of affidavit dated January 10, 1955 executed by the appellant in the presence of Inspectors

Myers and Bader. In this affidavit appellant stated that he is President of James J. Moroney, Inc., a plumbing and heating business, which was being conducted by his wife and son. His hours of duties at the Post Office are from 9:00 a.m. to 6:00 p.m., with lunch between 12:00 noon and 1:00 p.m. He stated "I usually spend approximately eight hours daily at the Post Office during weekdays (Mondays to Fridays); about six hours on Saturdays and two to three hours on Sundays. I find this is necessary because of shortage of manpower, supervisory and clerical." The appellant also stated that he had been at his place of business (plumbing and heating) sometime during the day between 9:00 a.m. and 6:00 p.m. while on his way to make bank deposits for the post office; further, that he had visited the Reader's Digest offices on several occasions and did not recall how much time he had spent there on Postal matters. He stated he does not permit his personal business to interfere with his being on duty at the Post Office.

In his initial affidavit to the Commission, dated May 27, 1955, the appellant stated that the four charges were based upon a claim that he devoted less than eight hours during the business part of the days mentioned to Post Office business. He repeated his previous statement concerning the need to perform duties outside of the Post Office, including his investigation for additional Post Office space, checking of the activities of mail trucks and Carriers, and checking of mail and parcel post routes. He stated his belief that the charges were actuated solely by reason of political expediency.

In a joint affidavit executed on May 11, and 12, 1955, Inspector Myers and Bader (respectively) stated they had the assignment to investigate the complaint that the appellant was not complying

with the regulation requiring him to spend not less than eight hours during the business part of the day in the conduct of the Post Office and the performances of appropriate duties. The basis for the three charges set forth above was the result of personal observations made by them. As an example of the appellant's activities on September 22, 1954 they stated that the appellant was observed at 2:50 p.m. to arrive at his place of business from which he left in his car at 3:03 p.m. and went to a residence where he picked up a man dressed in working clothes; that at 3:15 p.m. the appellant stopped at a construction job where a truck, with his firm name painted on the side, was parked and he left the workman off; that he left this location at 3:37 p.m. carrying a roll of blueprints and at 3.42 p.m. stopped in front of the Village Clerk's office into which he took the blueprints; and that he left the office of the Village Clerk and returned to his plumbing firm at 4:09 p.m., where he stayed until 5:05 p.m. and left for home without stopping at the Post Office. In referring to the fourth charge concerning the appellant's affidavit statement given on January 10, 1955, they stated their investigation disclosed the appellant's statement of spending approximately eight hours daily at the Post Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, was not true and they were unable to locate any person who would support the Postmaster's statement.

The statement of Mr. N. R. Abrams, Assistant Postmaster General, Bureau of Post Office Operations, dated June 23, 1955, addressed to the Commission pointed out that the appellant's reply to the charges did not deny the specific charges and the Department contended that the Inspectors' observations on the three cited dates proved conclusively that the appellant was not only absent from the Post Office during the hours he was required to perform his official duties but actually

performed certain business transactions in connection with his interest in the private business concern of James J. Moroney, Inc. The statement continued that the affidavits of employees in the Post Office, copies of which were furnished to the Commission, substantiated the charge that the appellant did not devote the required time to the performance of his official duties. The statement indicated that in view of the facts in the case and the evidence submitted, it could only be concluded the appellant had failed to devote the required time to the performance of his official duties and the Department would be remiss if it failed to remove him from the service.

Subsequent to the hearing, this office received a letter dated August 8, 1955 from Mr. H. B. Montague, Postal Inspector in Charge, New York Division, New York City, outlining the contents of the letter dated August 4, addressed to the Chief Inspector by Assistant Postmaster General Abrams quoted as follows: "All orders for the removal of Postmasters at first, second and third-class offices are by direction of the President. The order for the removal of Mr. Moroney as Postmaster at Pleasantville was by direction of the President."

* * * * * * *

It is considered that the Post Office Department has complied with the procedural requirements of the law and the regulations with respect to affording the appellant thirty (30) days' advance written notice of the proposed separation, opportunity to reply and consideration of his reply, and notice of final decision to effect his separation with the reasons therefor.

With respect to the question of the compliance with the requirement of specificity and detail in the proposed separation notice, it is considered that the first three charges were sufficiently specific to

apprise the appellant of the fact that he had been observed on three dates to spend a certain amount of time at his own business firm between the official hours of duty when he should have been devoting his time to Post Office business in accordance with the provisions of the Postal Manual. It is also considered that the fourth charge relative to the alleged falsity of the appellant's affidavit statement concerning the amount of time he spent at the Post Office was sufficiently specific, in the light of the three previous charges, to enable the appellant to submit a reply in his own defense.

In discussing the merits of the charges it is significant to note that prior to the hearing held in this office, the Department did not submit any record evidence in support of the four charges. The various affidavits which the Post Office Inspectors had obtained from Post Office employees do not contain any information to show that the employees had knowledge of the appellant's activities on the three dates cited in the charges; further, when interviewed during the Commission's investigation these same employees indicated their lack of knowledge concerning the facts related in the charges for those three dates.

The joint affidavit furnished by the Post Office Inspectors to the Commission indicated that the basis for the charges resulted from their personal observation; that on September 22, 1954 the appellant was observed at 2:50 p.m. to arrive at his place of business which he left at 3:03 p.m. and visited three other locations; that the appellant returned to his plumbing firm at 4:09 p.m. where he stayed until 5:05 p.m. and left for his home without stopping at the Post Office.

During the hearing, the testimony of the Inspectors was to the effect that they failed to keep any detailed notes concerning their observations of the appellant on the three dates in question.

As a result, neither of the Inspectors were in a position to testify as to the exact time on the three dates in question when the appellant may have been observed at the premises of his plumbing firm and by whom the observation was made. Their testimony would indicate that the hours and minutes cited in the charges were composite figures taken from their notes at the time the charges were prepared. The Inspectors' testimony also indicates that in actual fact the appellant was observed only either entering or leaving the premises of his business firm; that he was not observed inside those premises and he may have departed by a rear exit without the Inspectors' knowledge; and that the Inspectors could not testify to their knowledge whether or not the appellant was actually engaged in Post Office or personal business during the period of such observation. The testimony of Inspector Bader relative to his observation of the appellant on September 22, between the hours of 3:03 p.m. and 4:09 p.m., when the appellant made various visits away from his plumbing firm is not considered pertinent to the charge since it was not included in the charge and since it does not relate to the appellant's having been observed on the premises of his business firm.

The appellant apparently is unable to submit any evidence to explain his whereabouts on August 25 and September 2, 1954 and entered a general denial of the charges. Although not supported by corroborative evidence, the appellant testified that if September 2, 1954 occurred on a Thursday (as it did) he was certain that he attended the Rotary Luncheon at Mt. Kisco, N. Y., since he had a record of perfect attendance at such luncheons; that he would have to leave about 12:00 noon for the luncheon and would return about 2:00 p.m.; and that his attendance at the Rotary was in line with his official duties as Postmaster. However, with respect to his activities on September 22, 1954,

the appellant submitted in evidence a letter dated July 26, 1955 from the General Office Manager of the Reader's Digest indicating that a check of the latter's records reflected that on the morning of the date in question the appellant was in the latter's office for a conference concerning the rental of warehouse space for the Post Office Department; further, the latter's recollection is that the appellant was there somewhere in the neighborhood of 8:30 to 9:00 a.m. and the conference lasted about one hour and fifteen minutes. It is pertinent to note that, subsequent to the hearing, an affidavit statement was obtained from Mr. Wilcox attesting that the letter was signed by him and the contents were true to the best of his knowledge and belief.

The Inspectors' testimony indicated that if the appellant had attended the Rotary Luncheon that would be considered within the realm of official Post Office business; further, that the appellant was not under their surveillance if and when he went to Mt. Kisco and they could neither refute or corroborate his testimony. The Inspectors' testimony was to the effect that they do not recall or cannot now state whether the appellant was under their surveillance when he allegedly visited the premises of the Reader's Digest on the morning of September 22; further, Inspector Bader stated that he considered Mr. Wilcox, the General Manager, to be a reputable individual whose veracity would not be questioned.

In connection with the fourth charge alleging that the appellant's affidavit statement of January 10, 1955 that he spent approximately eight hours daily between 9:00 a.m. and 6:00 p.m., Monday through Friday at the Post Office, it is pertinent to note that the affidavit actually stated; "I usually spend approximately eight hours daily at the Post Office during weekdays (Mondays to Fridays; about six hours on Saturdays and two to three hours on Sundays. I find this is necessary because

of shortage of manpower, supervisory and clerical." Since the appellant's affidavit was summarized out of context in preparing the charge and the word "usually" was omitted from the charge, it is considered that this charge cannot be sustained since it does not contain a true statement of facts.

In view of the above, after considering all of the evidence of record, it is the opinion of this office that the Post Office Department has failed to affirmatively support the charges alleging that the appellant was observed to have spent the specified times at his own business firm conducting other than official Post Office business on the three dates in question. The testimony of the Inspectors acknowledges that a Postmaster may be required to conduct official Post Office business outside of the Post Office premises.

Under the circumstances, since none of the charges is sustained, it is the opinion of this office that the appellant's removal from the service would be improper and not for such cause as would promote the efficiency of the service within the meaning of the language of Section 14 of the Veterans' Preference Act.

Findings and Recommendations

It is the finding of this office, based on all of the evidence of record, that the Post Office Department's decision to effect the appellant's removal from the position of Postmaster was improper and was not based upon sustained charges.

It is recommended, therefore, that the Department take the necessary action to cancel it. decision to remove the appellant. This memorandum constitutes the authority to take the recommended action.

No appeal from this decision will be considered unless it is submitted to the Chairman, Board of

Appeals and Review, U. S. Civil Service Commission, Washington 25, D. C., within seven (7) days after receipt of this decision. Notification of a further appeal should be given to this office so the case files can be transmitted promptly to the Commission.

Since there is no further right to a hearing, additional representations should be made in writing and submitted in duplicate with the appeal to the Commission.

The Post Office Department will please notify this office of the action taken or proposed to be taken in Mr. Moroney's case within seven (7) days after receipt of this decision.

JOHN A. GALVIN
Appeals Examiner

JAMES P. GOOGE
Regional Director

Attachments:
Transcript of Hearing
August 29, 1955

On May 15, 1956 the Civil Service Commission Board of Appeals and Review reversed the Second Region on grounds that the evidence sustained the charges. It had nothing before it but the record. Reversal of the Second Civil Service Region was arbitrary.

None of the evidence adduced at the Civil Service hearing was ever before the Post Office Department.

ARGUMENT

Under the Veterans Preference Act of 1944, 5 U.S.C. 863, petitioner was entitled to an agency hearing and a Civil Service hearing on the charges made against him. Section 14 of the Act provides that veterans shall have an opportunity to answer a proposed

reduction in rank and compensation "personally and in writing" at the agency level. The language is mandatory, and does not depend upon a specific request. As stated in *Washington* v. *U. S.*, 147 F. Supp. 284, "the phrase 'personally and in writing' is clear and unambiguous. It means exactly what it says." Petitioner was given no such personal hearing. This Court has said veterans legislation is to be construed liberally. *Fishgold* v. *Sullivan Drydock & Engineering Corp.*, 328 U.S. 275, 286, 287; *Boone* v. *Lightner*, 319 U.S. 561. The very purpose of the Act is to give "preference" to veterans, and that construction of the law which gives effect to the statutory remedy must be followed. Petitioner is a veteran. The Post Office Department had an affirmative duty to hold a personal hearing on the charges. It did not do so. Petitioner never had an effective opportunity to challenge the charges and meet the witnesses against him at the agency level in person and testify in person.

Petitioner had a hearing before the Civil Service Commission, as required by Section 14, but that does not cure the defect of lack of agency hearing. *Wittner* v. *U. S.*, 110 Ct. Cls. 231; *Washington* v. *U. S.*, 147 F. Supp. 284.

The Administrative Procedure Act requires a reviewing court to hold unlawful agency action which is "without observance of procedure required by law." 5 U.S.C. 1009 (e). This clear Congressional direction requires the Court to review the record for compliance with statutory procedures. This Court has reserved opinion on the applicability of the Administrative Procedure Act to federal employee actions. *Blackmar* v. *Guerre*, 342 U.S. 512. Other courts have held that it does apply. *Ladeu* v. *Crossen*, 108 F. Supp. 240;

Fischer v. *Haeberle*, 80 F. Supp. 652; *Wettre* v. *Hague*, 74 F. Supp. 396. Cf. *Hargett* v. *Summerfield*, 243 F. 2d 29. If application of that Act to veterans is favorable, they should have the preference of its application.

In his personal appearance before the Second Civil Service Region, petitioner was able to persuade the examiner that the charges were unsupported by evidence. Had he had such an opportunity at the Post Office Department level, he might have done likewise. Congress clearly provided that he should have that opportunity. He was not given it, and has lost substantial rights thereby. As stated in *Stringer* v. *U. S.*, 138 F. Supp. 271:

> "It seems rather strange that department officials are sometimes reluctant to follow the simple requirements of an Act of Congress. Perhaps it is pride in a decision already rendered, or a desire not to acknowledge a mistake. At any rate, they sometimes seem to acknowledge the necessity of a concession grudgingly rather than openly and willingly, to make the barest sort of correction rather than a real compliance.
>
> There is nothing ambiguous about the Veterans Preference Act. Rightly or wrongly, it was enacted by the Congress in recognition of the great sacrifices of those who had an active part in our national defense at times when everything we cherish was at stake."

CONCLUSION

In the light of the above, it is submitted that this Court should grant a writ of certiorari in the above entitled case.

CARL L. SHIPLEY
SAMUEL RESNICOFF
Attorneys for Petitioner

We, Carl L. Shipley and Samuel Resnicoff, Counsel for Petitioner, do hereby certify that the foregoing Petition For Rehearing Of Order On Petition For Writ Of Certiorari is presented in good faith, not for delay, and that the petition is restricted to the grounds specified in Rule 58 of the Revised Rules of the Supreme Court of the United States. (Paragraph 2)

CARL L. SHIPLEY

SAMUEL RESNICOFF